



MITCHELL SILBERBERG & KNUPP LLP
A LAW PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

Eleanor M. Lackman
Partner
(212) 878-4890 Phone
(917) 546-7675 Fax
eml@msk.com

March 6, 2024

By ECF

The Honorable Judge Netburn
United States District Court
Southern District of New York
40 Foley Square, Room 2201
New York, NY 10007

Re: *Norris v. Goldner, et al., 19-cv-5491 (PAE)(SN)*

Dear Judge Netburn,

We represent the defendants in the above-referenced action. We write pursuant to Your Honor's Individual Rule III.D. and III.B. with respect to plaintiff's motion that was fully submitted as of Friday (ECF No. 186). Plaintiff's reply brief contains extensive new and hyper-technical factual matter pertaining to the scope and timing of plaintiff's copyright registration. Much of that factual material is inaccurate, including with respect to the claim that the works at issue were not used by the defendants prior to registration, as pertinent to Section 412 of the Copyright Act. The factual material at issue appears on pp. 1-2 and 4-5, although the only factual citation included does not appear to support the point. That said, even if the Court gives credit to the single cited case that appears to support the defendants' position regarding the bright-line rule in any event, defendants can demonstrate and have demonstrated that the alleged violations occurred prior to the registration (including in specimens filed with the USPTO as well as in a catalog), which is December 4, 2018 and not November 18, 2019 as claimed, and therefore statutory damages (and attorney's fees) are barred.

While the right to damages turns on a burden of proof that belongs to the plaintiff, and that burden has not been met regardless of the new points raised on reply, a party is not supposed to be ambushed by brand-new arguments and facts that should have been raised, if at all, in the moving papers. Accordingly, to the extent the Court gives credit to the brand-new allegations regarding the commencement of the specific uses at issue, defendants respectfully request the right to submit a surreply on this specific issue, or to address this specific issue at oral argument.



The Honorable Judge Netburn
March 6, 2024
Page 2

On behalf of defendants, we thank the Court for its consideration of this request.

Respectfully submitted,

A handwritten signature in blue ink that appears to read "E. M. Lackman".

Eleanor M. Lackman

MITCHELL SILBERBERG & KNUPP LLP

cc: All counsel of record (Via ECF)